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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RUBEN COLON, Petty Officer First Class,
United States Navy,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a military member may constitutionally be tried and convicted of a capital offense by a "jury" consisting of only five members?

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Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Ruben Colon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on March 21, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Colon*, —— M.J. —— (C.M.A. March 21, 1991), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Colon*, No. 88-4988, slip op. (N.M.C.M.R. Oct. 31, 1990), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals granted the petition for review on March 21, 1991, and affirmed petitioner's conviction on the same day. Petitioner's con-

viction had previously been affirmed by the United States Navy-Marine Corps Court of Military Review on October 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

STATUTE INVOLVED

10 U.S.C. § 816 Courts-martial classified

> The three kinds of courts-martial of the armed forces are—
>
> (1) general courts-martial consisting of—
>
> (A) a military judge and not less than five members; . . . .

STATEMENT OF THE CASE

On 14 July 1988, petitioner was found guilty, contrary to his pleas, of felony murder,[1] robbery,[2] and kidnaping.[3] Although the case was referred capital, petitioner was sentenced to life imprisonment, forfeiture of all pay and allowances, reduction to the pay grade of E-1, and a dishonorable discharge. Petitioner was tried and sentenced by a court-martial consisting of only five members.[4]

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[1] 10 U.S.C. § 918(4), Article 118(4) (1982 and Supp. 1984).

[2] 10 U.S.C. § 922, Article 122 (1982 and Supp. 1984).

[3] 10 U.S.C. § 934, Article 134 (1982 and Supp. 1984).

[4] Under the Uniform Code of Military Justice, an accused may be tried by a military judge alone, or by a panel of members, usually officers, chosen by the officer exercising court-martial convening authority. *See* 10 U.S.C. § 825 (1982). However, where a case is referred capital, as in this case, an accused may not elect to be tried by

Appellant's conviction and sentence were affirmed by the Navy-Marine Corps Court of Military Review. *United States v. Colon*, No. 88-4988, slip op. (N.M.C.M.R. Oct. 31, 1990). The United States Court of Military Appeals granted the petition for review and summarily affirmed the lower court's decision. *United States v. Colon*, —— M.J. —— (C.M.A. March 21, 1991).

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THIS WRIT BECAUSE PETITIONER WAS ARBITRARILY DEPRIVED OF HIS FUNDAMENTAL RIGHT TO A JURY CONSISTING OF AT LEAST SIX MEMBERS.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The Court has made clear the importance of the right to a jury trial in the American system of criminal justice. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court extensively documented the origins and importance of the right to a jury trial, and concuded that the right is "a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Id.*, at 157-158. *Duncan* held that the Sixth Amendment right to a jury trial for non-petty offenses applies to the states through the Fourteenth Amendment.[5]

Ten years after *Duncan*, the Court unanimously held that the Constitution mandated that a minimum of six persons serve on a jury. *Ballew v. Georgia*, 435 U.S. 223 (1978). *Ballew* noted several studies which indicated

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military judge alone. Rules for Courts-Martial 501(a)(1)(B), Manual for Courts-Martial, United States, 1984.

[5] Not only has the Court recognized the importance of a jury trial to an accused, it recently reaffirmed that participation by the citizenry as *jurors* is a legitimate means to serve important societal ends. See *Powers v. Ohio*, —— U.S. ——; 111 S.Ct. 1364 (1991).

that progressively smaller juries are less likely to foster effective group deliberation, and that the risk of convicting an innocent person increases as the size of a jury diminishes. The Court also noted the adverse impact on minority representation as jury size decreases. The Court concluded that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members." *Id.* at 239.

Despite the universally recognized importance of the right to a jury trial, and the Court's clear guidelines regarding the number of jurors required by the Sixth Amendment, millions of Americans are systematically deprived of this right. In clear violation of the principles of *Ballew*, Article 16 of the Uniform Code of Military Justice [6] requires only that a general court-martial consist of "a military judge and not less that five members." The number of members in a general court-martial typically ranges from five to ten, depending completely on the whim of the accused's commander. This state of affairs continues to exist, despite the fact that this Court has never squarely held that the Sixth Amendment right to a jury trial does not apply to the military. Petitioner was convicted by a court consisting of only five members.

The continued deprivation of the right to a jury trial in the military is based on a line of dicta, emanating from *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). In *Milligan*, the Court indicated that the Sixth Amendment right to a jury trial does not apply to the military by implication because the Fifth Amendment expressly excepted the military from the grand jury requirement. The Court stated:

> The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases;

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[6] 10 U.S.C. § 816.

> but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;" and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the Fifth.

Id. at 123.

Petitioner acknowledges that this interpretation of the Fifth and Sixth Amendments has been reaffirmed by this Court, without further scrutiny, on several occasions since *Milligan*. *See Ex parte Quirin*, 317 U.S. 1, 40 (1942); *Welchel v. McDonald*, 340 U.S. 122 (1950); *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969). Military courts have also adhered to this interpretation. See *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); *United States v. Jenkins*, 20 U.S.C.M.A. 112, 42 C.M.R. 304 (1970); *United States v. Rice*, 3 M.J. 1094 (N.C.M.R. 1977).

Despite these reiterations of the *Milligan* dicta, this Court, and the military courts have continued to require specific military justification before depriving military personnel of the same rights afforded civilian citizens. For example, in *Burns v. Wilson*, 346 U.S. 137 (1953), the Court stated that "military courts, like the state courts, have the same responsibilities as do federal courts to protect a person from a violation of his constitutional rights." *Id.* at 142. In *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976), the Court of Military Appeals, holding the Fifth Amendment due process clause applicable to the military, decided that "the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." *Id.* at 270.

Given the dubious genesis of the rule excepting military personnel from the Sixth Amendment right to a

jury trial, petitioner requests that this Court re-examine the applicability of cases which deprive service members of the right to a jury trial, irrespective of the offense or the circumstances of its commission. Petitioner believes that two reasons compel this scrutiny: 1) the expanded jurisdiction of military courts-martial in light of this Court's holding in *Solorio v. United States*, 483 U.S. 435 (1987), and (2) the lack of any modern justification or military necessity for the deprivation of the fundamental right to a jury trial, particularly for offenses committed in peacetime.

In *O'Callahan v. Parker*, this Court held that for an offense to be triable in a military court-martial, the offense must be "service connected" in some way. In so limiting the jurisdiction of courts-martial, the Court recognized that courts-martial lack the protections normally afforded defendants in civilian courts, including the right to a jury trial:

> We have concluded that the crime to be under military jurisdiction must be service connected, lest "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers.

Id. at 272-73.

The Court dramatically expanded court-martial jurisdiction when *Solorio v. United States* overruled the service connection requirement of *O'Callahan*. As the law stands today, court-martial jurisdiction depends solely on whether the accused is a member of the military. A court-martial may try any offense, whether military or civilian in nature, whether committed in time of peace or conflict, and despite the availability of civilian courts with jurisdiction to try the case.

The Court should note that military jurisdiction not only extends to active duty personnel, but to millions of reservists and retired personnel as well. *See* 10 U.S.C.

§ 802. Military courts have exercised this jurisdiction regularly and have interpreted the jurisdictional statute expansively. *See Murphy v. Garrett*, 29 M.J. 469 (C.M.A. 1990) (Marine Corps permitted to exercise court-martial jurisdiction over reservist for offense which occurred when he served as a regular officer); *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990) (court-martial jurisdiction extended to retired chief petty officer working for Navy as a civilian employee and accused, *inter alia*, of violating orders).

Given the ubiquitous application of court-martial jurisdiction, it is more important than ever that the Court determine whether the Sixth Amendment right to a jury trial should apply to certain types of courts-martial. Service members are routinely tried for common law offenses, with absolutely no service connection, and are systematically deprived of the rights enjoyed by their civilian counterparts simply by virtue of the person's status as a military member.

The famous *Milligan* dictum was based in part on the theory that the "discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by common law courts." *Milligan* at 123. While a jury trial may have posed logistical difficulties when the Constitution was drafted and during the Civil War, there is no military justification for the continued deprivation of the right to a jury trial in modern times.[7] It strains credulity to suggest that conforming with the jury size requirements of *Ballew* would pose any significant burden on today's military with its extensive communication and transportation facilities, especially during peacetime. Conforming with *Ballew*

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[7] The Articles of War enacted May 31, 1786 recognized that small detachments of United States forces may be insufficient to hold a general court-martial, but nevertheless stated that "[g]eneral courts-martial may consist of any number of commissioned officers from 5 to 13 inclusively; but they shall not consist of less than 13 where that number can be convened without manifest injury to the service." Winthrop, *Military Law and Precedent* 972 (2d ed. 1920).

would merely entail the detailing of one additional member to general courts-martial.[8]

CONCLUSION

Currently, the military is the only jurisdiction in the United States where an accused is not entitled to trial by at least a six member jury. The Court has never ruled directly on this important issue. Currently, an accused facing the death penalty must rely on the whim of his commanding officer as to whether the number of jurors meets constitutional muster. Given the Court's expansion of military jurisdiction in *Solorio* and the lack of any military justification for the continued deprivation of the fundamental right to a jury trial, the Court should grant this petition and re-examine the continued validity of the statute depriving miliary citizens of the Sixth Amendment right to a jury trial in general courts-martial.

Respectfully submitted,

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[8] The application of *Ballew* to courts-martial would not affect special courts-martial, which require a minimum of only three members, because the maximum penalty at a special court-martial is six months confinement. See *Baldwin v. New York*, 399 U.S. 66 (1970) (right to a jury trial does not extend to petty offenses; no offense can be deemed petty where punishment may exceed imprisonment for six months).

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 65729/NA
CMR Dkt. No. 88-4988

UNITED STATES,
Appellee

v.

RUBEN COLON (093-46-2995),
Appellant

ORDER

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Military Review, it is by the Court this 21st day of March, 1991

ORDERED:

That said petition is hereby granted on the issues raised by appellate defense counsel; and

That the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (FASANARO, Esq.)
Appellate Government Counsel (FAVORS)

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

Before E. M. BYRNE, KENT A. WILLEVER, R. A. STRICKLAND.

UNITED STATES

v.

RUBEN COLON, 093 46 2995
Electronics Warfare Technician
First Class (E-6), U. S. Navy

NMCM 88 4988 Decided 31 October 1990

Sentence adjudged 14 July 1988. Military Judge: John A. Studer. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Helicopter Wings, Atlantic, Box 102, Naval Air Station, Jacksonville, FL 32212-0102.

LT THOMAS E. MIRO, JAGC, USNR, Appellate Defense Counsel

LCDR SUSAN K. MILLIKEN, JAGC, USN, Appellate Defense Counsel

LT STEPHEN PONTICIELLO, JAGC, USNR, Appellate Government Counsel

MICHAEL F. FASANARO, Jr., Esquire, Civilian Defense Counsel

STRICKLAND, Judge:

Appellant was tried by general court-martial composed of officer members. Contrary to his pleas, he was convicted of unpremeditated murder, murder while committing robbery, robbery, and kidnapping in violation of Articles 118, 122 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 918, 922 and 934, respectively.[1] Although the murder charge was referred as a capital offense, and appellant was found guilty of murder while committing robbery, by unanimous vote, he was sentenced to confinement for life, forfeiture of all pay and allowances, reduction to pay grade E-1 and a dishonorable discharge. The convening authority approved the sentence as adjudged.

Appellant raises ten assignments of error on appeal.[2] We find all assignments of error to be without merit and affirm.

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[1] Appellant was charged with a single specification under Article 118, UCMJ, which alleged both premeditated murder and murder during the commission of a robbery. In order to facilitate instructions to the members and their findings, the military judge directed the findings work sheet be redrafted to indicate two separate specifications of Article 118. Following findings, the military judge held these two specifications merged into the single offense of felony murder and further held that all offenses of which appellant was found guilty were multiplicious for sentencing.

[2] I. EVIDENCE OBTAINED FROM SAFE DEPOSIT BOX 23, AMERICAN NATIONAL BANK WAS IMPROPERLY ADMITTED BECAUSE THERE WAS NO PROBABLE CAUSE TO ISSUE A WARRANT.

A. THERE WAS NO PROBABLE CAUSE TO BELIEVE EVIDENCE OF A CRIME WOULD BE FOUND IN BOX 23, AMERICAN NATIONAL BANK BECAUSE THE GOVERNMENT NEITHER POSSESSED NOR PRESENTED INFORMATION TO THE MAGISTRATE THAT SHOWED A NEXUS BETWEEN THE EVIDENCE SOUGHT AND THE PLACE TO BE SEARCHED.

[Continued]

I

Lieutenant Junior Grade (LTJG) Ratish Prasad was the disbursing officer on board the USS JOHN HANCOCK (DD-981). On the morning of 15 March 1988,

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[2] [Continued]

B. THE AFFIDAVIT PRESENTED TO THE MAGISTRATE IN SUPPORT OF THE WARRANTS LACKED A SHOWING OF PROBABLE CAUSE AND CONTAINED ONLY INNUENDO, MISINFORMATION, AND UNFOUNDED BAD-FAITH CONCLUSIONS, WHICH WERE CALCULATED TO MISLEAD.

C. THE INFORMATION CONTAINED IN THE AFFIDAVIT WAS STALE AND COULD NOT SUPPORT A FINDING OF PROBABLE CAUSE.

II. ARTICLE 118 OF THE UNIFORM CODE OF MILITARY JUSTICE VIOLATES THE DUE PROCESS GUARANTIES OF THE FIFTH AMENDMENT BY REQUIRING AN AUTOMATIC SENTENCE TO EITHER DEATH OR IMPRISONMENT FOR LIFE.

III. THE TRIAL JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN DENYING APPELLANT'S MOTION (APPELLATE EXHIBIT XII) TO SUPPRESS EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT AS THERE WAS A LACK OF PROBABLE CAUSE TO ISSUE THE SEARCH WARRANT COUPLED WITH HIS RULING WHICH IN ESSENCE STRUCK A VITAL PORTION OF THE EVIDENCE SET FORTH IN THE AFFIDAVIT.

IV. THE TRIAL JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN DENYING APPELLANT'S MOTION (APPELLATE EXHIBIT XIII) TO SUPPRESS ILLEGALLY SEIZED EVIDENCE.

V. THE TRIAL JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN DENYING APPELLANT'S MOTION (APPELLATE EXHIBIT XIV) TO SUPPRESS ILLEGALLY SEIZED EVIDENCE.

VI. APPELLANT WAS PREJUDICED BY THE ADMISSION OF IRRELEVANT AND INFLAMMATORY MATERIAL CONTAINED IN A SURVEILLANCE VIDEOTAPE RECORDED BY THE NAVAL INVESTIGATIVE SERVICE.

[Continued]

LTJG Prasad was missing from officer's call. His absence was noticed, but it was not considered unusual since it was payday and the disbursing officer routinely prepared for this event in his office. Later, however, when LTJG Prasad could still not be located, it was discovered that one of the safes in the disbursing office was unlocked and open. Missing from the safe was $94,629.00 in U.S. currency; 2,575 blank, consecutively numbered U.S. Treasury checks with the pre-printed name "USS JOHN HANCOCK" on them; and a Treasury check made payable to a crew member in the amount of $419.00. A search of the ship led to the discovery of LTJG Prasad's body in the seabag locker located in the forward part of the ship. He had been bound, gagged, strangled and, ultimately, shot through the head with a .38 caliber weapon.

An intense investigation by the Naval Investigative Service (NIS), assisted by the Federal Bureau of Investigation (FBI), ensued. As few as 20 and as many as 40 NIS agents participated and were under the overall su-

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[2] [Continued]

VII. THE MILITARY JUDGE ERRED BY IMPROPERLY DIVIDING THE SPECIFICATION OF CHARGE I INTO TWO SPECIFICATIONS.

VIII. THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE OBTAINED FROM A SEARCH OF APPELLANT'S RESIDENCE WHEN THE ONLY SOURCE OF APPELLANT'S ADDRESS THE ACCUSED'S STATEMENT MADE TO THE NIS WITHOUT PROPER RIGHTS WARNING AND WHICH WAS SUPPRESSED AT TRIAL.

IX. THE EVIDENCE FAILED TO PROVE APPELLANT'S GUILT TO THE CHARGE OF ROBBERY BEYOND A REASONABLE DOUBT.

X. APPELLANT WAS PREJUDICED BY THE MILITARY JUDGE'S CONFUSING AND CONVOLUTED INSTRUCTIONS TO THE MEMBERS CONCERNING RECONSIDERATION.

pervision of Special Agent Fox.[3] All crew members of the ship were interviewed. LTJG Prasad was a part of the duty section for the evening of 14-15 March, and was last seen alive at approximately 0015, 15 March, therefore, the interviews concentrated on persons coming on and going off the ship during the very early morning hours of 15 March.

Chief Radioman Knoll stood the Quarterdeck watch from 0400 to 0800 on the morning of 15 March, and was thus in a position to observe individuals boarding and leaving the ship. Knoll was interviewed by NIS agents on three occasions. During the first interview on 15 March, Knoll stated that he had seen appellant depart the ship between 0615 and 0620. While he made no specific reference to whether appellant carried any bag off the ship, he implied that he had checked all baggage coming on and off the ship. On 23 March, Knoll was interviewed by a different NIS agent and stated that he had observed four civilians, appellant and another crew member depart the ship. He indicated that appellant had carried a large green bag off the ship and the agent understood Knoll to say that he had searched this bag.[4] The third interview was initiated by Chief Knoll on 28 March after attending a department head meeting. During this meeting it was revealed that appellant, who had nearly 15 years of active service, had submitted a request for an early separation from the Navy when it had been anticipated that he would reenlist and complete the 20 years necessary for retirement.[5] Despite these earlier

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[3] Special Agent Fox was assigned as the "Case Agent" and, as such, was responsible for overall coordination of the investigation and the efforts of all investigators assigned to the case.

[4] At trial Chief Knoll professed no recollection of these two interviews and maintained that he first remembered appellant leaving the ship on 28 March.

[5] Appellant was in the process of changing rates from an Electronics Warfare Technician to a Navy Counselor. He had under-

interviews with NIS, which at the time of trial Chief Knoll did not recall, this information keyed the memory of Knoll and he related to NIS that he specifically remembered that the appellant had left the ship on the morning of the 15th. He stated that appellant left at approximately 0500 and was carrying a green cloth bag. He did not believe that the bag was checked and he recalled appellant returning to the ship about 45 minutes later empty handed.

Further investigation revealed that appellant had requested leave on 14 March and had taken leave from 18 to 28 March. There were several inconsistencies with respect to this leave, including an erroneous leave address and an inaccurate representation as to where appellant had actually gone on leave. Appellant, who had indicated in initial interviews that he had not left the ship on 15 March, except possibly to dispose of trash, denied culpability in a 29 March interview. On 8 April, NIS received information from the security manager of the American National Bank that appellant had rented a safe deposit box at one of the bank's branches. A bank official became suspicious because appellant, who identified himself as a crew member of the HANCOCK, appeared nervous and worried, looked around frequently, asked for the largest box available, and asked if Government agents could obtain access to the box.

Appellant was placed under surveillance by the NIS and the FBI the following day. Appellant was observed entering and leaving two other banks and ultimately arrived at the American National Bank. He exited his vehicle and removed a blue cloth bag which appeared to have something in it and entered the bank. When appellant exited the bank he was empty handed. Bank personnel indicated that appellant had gained access to the safe deposit box he had rented the previous day. Chief

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gone "on the job" training as a career counselor and was awaiting a formal school to properly complete the change in rate.

Knoll was shown surveillance tapes on 12 April and indicated the bag appellant carried into the bank resembled the one he had seen appellant carry off the ship. Inquiry of bank personnel on 11 and 12 April revealed that appellant had not accessed the safe deposit box since 9 April.

On 12 April, Special Agent Fox executed an affidavit and appeared before a United States Magistrate for the Middle District of Florida seeking a search warrant of appellant's safe deposit box at American National Bank. Based on the affidavit, the magistrate issued a search warrant. The search warrant was executed the same day and resulted in the recovery of $87,250.00 in U.S. currency, 2,575 blank U.S. Treasury checks imprinted with the name "USS JOHN HANCOCK," a check payable to a HANCOCK crew member in the amount of $419.00 and a Mosler safe deposit box. Appellant was thereafter apprehended and a consent search of his apartment (authorized by appellant's live-in girl friend) was conducted producing several more items of evidentiary value.

II

Four of appellant's assignments of error (I, III, IV and V) attack, on numerous theories, the validity of the search warrant for the safe deposit box. Each theory will be discussed separately.

A.

Appellant asserts that there was no probable cause to believe evidence would be found in the safe deposit box because the information contained in the affidavit failed to show a nexus between the evidence sought and the place to be searched. He maintains this on the basis that the evidence sought had to have been removed from the HANCOCK; there were no restrictions on persons leaving the ship the morning of the 15th or thereafter; no records were kept of persons leaving the ship, thus

causing authorities to rely on the memory of watchstanders; and persons other than appellant were seen leaving the ship carrying articles capable of concealing the evidence. Therefore, appellant reasons that anyone who had been on board the ship at the time of the crime could have removed the evidence and would be subject to a search, thus resulting in a "fishing-expedition."

"Probable cause to search exists when there is a reasonable belief that the . . . evidence sought is located in the place . . . to be searched." Military Rules of Evidence (Mil.R.Evid.) 315(f)(2). "[T]he traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (citing *Jones v. United States*, 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697, 708 (1960)).

We believe that the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing in this case and that, far from a "fishing-expedition" with respect to anyone aboard the HANCOCK, all information focused specifically on appellant as the perpetrator of these offenses. The fact that these offenses occurred between approximately 0215 and 0315 on 15 March (based on testimony of the medical examiner), narrows the field of persons potentially responsible to those on board at the time. Since the ship was in port and normal liberty had been granted, a majority of crew members were not on board. The field is narrowed further, although not conclusively so, to those seen leaving the ship prior to the discovery of LTJG Prasad's body. Even further attention focuses on individuals leaving who carried articles capable of containing the fruits of the crime. Appellant and one other crew member were observed carrying articles off the ship. Although appel-

lant points out that this other crew member carried a briefcase, it is unlikely that this briefcase could have contained all of the money and checks which ultimately filled a 10 x 10 x 21-inch safe deposit box.[6] Appellant's unexpected and unexplained decision to leave the Navy only 5 years before becoming retirement eligible with no apparent job plans, further highlighted appellant. Perhaps the most damning revelation, however, and the one which directed sole attention to appellant, was the manner in which he rented the safe deposit box at American National Bank and his concern over whether Government agents could access the box. This coupled with the surveillance tape, indicating the bag carried into the bank resembled the one appellant carried off the ship, finally narrowed the field to one person, the appellant. We believe these factors established a "nexus" in this instance and provided a substantial basis for the magistrate to conclude that the fruits of this crime would be discovered in appellant's safe deposit box.

B.

In three separate assignments of error, appellant attacks the sufficiency of the affidavit presented to the Federal Magistrate. He assails it for containing misinformation calculated to mislead and for containing numerous factual inaccuracies and omissions which he asserts results in a failure of the affidavit to support a finding of probable cause. Specifically, he contends that the accounts of the interviews with Chief Knoll are "twisted and incomplete" in that they failed to relate the inconsistencies among the interviews with respect to the color of the bag appellant carried, whether it was searched and whether appellant was even observed leaving the ship. Appellant also points to an alleged poor reputa-

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[6] It is also significant to note that this crew member, as well as several others who had been considered as potential suspects, were "non-deceptive" on a polygraph examinations administered by NIS as of 6 April 1988.

tion of Chief Knoll as a watchstander which was not revealed to the magistrate. Appellant further contends that inaccuracies in the affidavit as to the date of death (14 vice 15 March), the date appellant was observed carrying the bag off the ship (18 vice 15 March), the color of the bag (dark vice green or blue) and the total amount of currency and checks missing are such that they do not support a finding of probable cause.

In order to attack the veracity of an affidavit for a search warrant, the United States Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), held that the defense must make a showing that the affiant made a false statement knowingly and intentionally, or with reckless disregard for the truth. This ruling has been incorporated into Mil.R.Evid. 311(g)(2). S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 201 (2d ed. 1986). The defense has the burden to make such a showing by a preponderance of the evidence before the burden shifts to the prosecution to establish by a preponderance of the evidence that the affidavit still establishes probable cause without the false statements. Mil.R.Evid. 311(g)(2).

In this case, the defense failed to demonstrate that the inconsistencies among Chief Knoll's statements were omitted knowingly and intentionally. In fact, the affiant, Special Agent Fox, testified that he was not even aware of the earlier statements given by Knoll until sometime after the search and apprehension had occurred and that he believed the information provided in the affidavit was correct. The only question remaining is whether the affiant evidenced a reckless disregard for the truth in swearing to the information in the affidavit. We believe he did not. As many as 40 agents were involved in the case and Special Agent Fox had not had time to review all of the voluminous reports by the time the tip was received from the bank. In fact, he testified it took him three weeks to read these materials and compile a final

report after appellant's apprehension. At most one might argue that Fox could have been more efficient in coordinating the investigation; however, his degree of efficiency and his potential disregard for the truth are completely unrelated. We find no evidence that the affiant possessed a reckless disregard for the truth of the information contained in the affidavit.

With respect to Chief Knoll's reputation as a watchstander, any criticism seems to have been associated with the fact that he occasionally strayed away from his post on quarterdeck. There are no allegations concerning deficiencies in his character for truthfulness or any other matter which might affect his reliability in providing information. We find no relevance between the asserted reputation for watchstanding and his reliability to truthfully relate his observations. We consider Chief Knoll to be akin to a "citizen informant" who is presumed to be reliable, *see United States v. Melvin*, 596 F.2d 492 (1st Cir. 1979), *cert. denied*, 444 U.S. 837 (1979), and find no evidence in the record to rebut this presumption.

Finally, turning to the inaccuracies in the affidavit, we are guided by the following principles. Affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684, 689 (1965). A magistrate's "determination of probable cause should be paid great deference by reviewing courts," *Spinelli v. United States*, 393 U.S. 410, 419, 89 S.Ct. 584, 591, 21 L.Ed.2d 637, 645 (1969), and these "courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *Ventresca* at 109, 85 S.Ct. at 746, 13 L.Ed.2d at 689. The standard to be applied in determining probable cause for issuance of a search war-

rant is the "totality of the circumstances." *See Gates, supra. See also United States v. Queen*, 26 M.J. 136 (C.M.A. 1988) (recognizing "totality of the circumstances test" in the military).

The affiant characterized the inaccuracies in the affidavit as typographical errors. He testified that he was in a rush to present the affidavit to the magistrate so the warrant could be executed and served prior to the bank closing for the day. The most significant testimony, however, came from the issuing magistrate. He indicated that it was of no concern to him that the early morning hours of 15 March were portrayed as 14 March since this is a common mistake. It also was of no concern to him that the affidavit alleged appellant left the ship carrying a bag on 18, vice 15, March, just as long as it chronologically followed the offenses. He stated the color of the bag was insignificant. In essence he testified that these inconsistencies would have had no bearing on his issuance of the warrant. We agree. Under the totality of circumstances in this case, giving due deference to the magistrate's decision, we find that the magistrate was correct in determining the existence of probable cause and authorizing the search in question.

C.

Appellant asserts that a U.S. Treasury check in the amount of $419.00, payable to an officer on board HANCOCK, was improperly seized since it was not among the property specified in the search warrant. This assertion is without merit. There is no dispute that the check was one of the items listed as missing from the disbursing office safe. Its seizure was proper since, during the course of properly executing the search warrant, it was discovered in plain view. *See Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In addition, it is not necessary that its discovery be inadvertent. *See Horton v California*, —— U.S. ——, No. 88-7164 (June 4, 1990).

II

In assignment of error VIII, appellant asserts that evidence seized during the consent search of his apartment was improperly admitted because the sole source of his address was a statement he gave which was later suppressed. The evidence complained of was a rope and business card. An expert testified this rope had the same fiber content as that found around LTJG Prasad's neck. The business card led to a discovery that appellant had purchased a .38 caliber pistol and ammunition from a local gun shop. An expert testified that the weapon was one of several types that could have fired the fatal shot and the ammunition was similar in characteristics to the spent round recovered in the seabag locker where the victim's body was found.

We find that the address of appellant's apartment would have been inevitably discovered had he not divulged this information in the suppressed statement. *See Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). Accordingly, the items were properly seized and admitted in evidence at trial.[7] We find the remaining assignment of error to be without merit.

III

We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. We are convinced of appellant's guilt of all of the charges and specifications beyond a reasonable doubt and find the sentence to be appropriate. Article 66(c), UCMJ. Accordingly, the findings and sentence, as approved on review below, are affirmed.

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[7] We note that even without this evidence the remaining evidence was still overwhelming as to appellant's guilt.

R. A. STRICKLAND

Chief Judge BYRNE and Judge WILLEVER concur.

(See Note Below)*

E. M. BYRNE

KENT A. WILLEVER

* Chief Judge Bryne participated in this case and concurred before beginning his terminal leave prior to retirement.

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